

**Devito Brothers Excavation, Inc. and Connecticut Laborers' Funds, a/w Laborers' International Union of North America, AFL-CIO. Case 34-CA-5557**

May 13, 1992

**DECISION AND ORDER**

BY CHAIRMAN STEPHENS AND MEMBERS  
OVIATT AND RAUDABAUGH

Upon a charge filed by the Connecticut Laborers' Funds, a/w Laborers' International Union of North America, AFL-CIO, the General Counsel of the National Labor Relations Board issued a complaint on March 12, 1992, against Devito Brothers Excavation, Inc., the Respondent, alleging that it has violated Section 8(a)(1) and (5) by failing and refusing to bargain collectively and in good faith with Connecticut Laborers' District Council of the Laborers' International Union of North America, AFL-CIO, the Union, within the meaning of Section 8(d) of the National Labor Relations Act. Although properly served copies of the charge and complaint, the Respondent has failed to file an answer.

On April 13, 1992, the General Counsel filed a Motion for Summary Judgment. On April 15, 1992, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

**Ruling on Motion for Summary Judgment**

Section 102.20 of the Board's Rules and Regulations provides that the allegations in the complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. The complaint states that unless an answer is filed within 14 days of service, "all of the allegations in the complaint shall be deemed to be admitted to be true and shall be so found by the Board." Further, the undisputed allegations in the Motion for Summary Judgment disclose that the Regional attorney for Region 34, by letter dated March 30, 1992, notified the Respondent that unless an answer was received by the close of business on April 6, 1992, a Motion for Summary Judgment would be filed. To date, no answer has been filed by the Respondent.

In the absence of good cause being shown for the failure to file a timely answer, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

**FINDINGS OF FACT**

**I. JURISDICTION**

The Respondent, a Connecticut corporation with an office and place of business in Southington, Connecticut, has been engaged as a contractor in the building and construction industry. During the 12-month period ending February 29, 1992, the Respondent, in the course and conduct of its business operations, provided services valued in excess of \$50,000 to the State of Connecticut, which is directly engaged in interstate commerce. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

**II. ALLEGED UNFAIR LABOR PRACTICES**

About July 1, 1987, the Respondent entered into an "Acceptance of Agreements" pursuant to Section 8(f) of the Act whereby it accepted and approved the collective-bargaining agreement between the Union and the Labor Relations Division of the Associated General Contractors of Connecticut, Inc. effective May 1, 1987, and the collective-bargaining agreement between the Union and the Connecticut Construction Industries Association, Inc. effective June 1, 1987, and agreed to be bound to such future agreements unless timely notice was given. The most recent collective-bargaining agreements are effective by their terms for the period April 1, 1991, to March 31, 1993.

The unit of Respondent's employees covered by these agreements is as follows:

All laborers employed by the Respondent; but excluding all other employees, and all guards, professional employees and supervisors as defined in the Act.

This constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

During the term of these agreements, based on the principles established in *John Deklewa & Sons*, 282 NLRB 1375 (1987), *enfd.* 843 F.2d 770 (3d Cir. 1988), *cert. denied* 488 U.S. 889 (1988), the Union has been, and is the limited exclusive collective-bargaining representative of the unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

Since about August 1, 1991, the Respondent unilaterally and without the consent of the Union

failed to continue in full force and effect all the terms and conditions of the agreements by failing to make the contractually required contributions to the Health and Welfare Fund, the Pension Fund, the Training Fund, the Legal Services Fund, the Annuity Fund, and the New England Laborers and Employers Education Trust Fund.

These subjects relate to wages, hours, and other terms and conditions of employment and are mandatory subjects for the purposes of collective bargaining.

The Respondent engaged in the above acts and conduct of failure to abide by the terms of the collective-bargaining agreement without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain as the limited exclusive representative of the Respondent's employees with respect to such acts and conduct.

#### CONCLUSION OF LAW

By its failure on and after August 1, 1991, to continue in full force and effect all the terms and conditions of the collective-bargaining agreements by failing to make contractually required contributions to the Health and Welfare Fund, the Pension Fund, the Training Fund, the Legal Services Fund, the Annuity Fund, and the New England Laborers and Employers Education Trust Fund, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

We shall order the Respondent to make all contractually required payments it failed to make since August 1, 1991.<sup>1</sup>

The Respondent shall also make its employees whole for any losses attributable to its failure to make the contractually required payments, as set forth in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enf. 661 F.2d 940 (9th Cir. 1981). All payments to employees shall be made with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

<sup>1</sup> Because the provisions of employee benefit fund agreements are variable and complex, we leave to the compliance stage the question of whether the Respondent must pay any additional amounts into the benefit funds in order to satisfy our "make-whole" remedy. See *Merryweather Optical Co.*, 240 NLRB 1213, 1216 (1979).

#### ORDER

The National Labor Relations Board orders that the Respondent, Devito Brothers Excavation, Inc., Southington, Connecticut, its officers, agents, successors, and assigns, shall

##### 1. Cease and desist from

(a) Refusing to bargain collectively with the Connecticut Laborers' District Council of the Laborers' International Union of North America, AFL-CIO, as the limited exclusive representative of its employees in the bargaining unit, by failing to make contractually required contributions to the Health and Welfare Fund, the Pension Fund, the Training Fund, the Legal Services Fund, the Annuity Fund, and the New England Laborers and Employers Education Trust Fund.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

##### 2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Continue in full force and effect all the terms and conditions of the collective-bargaining agreements with the limited exclusive representative of the employees in the following appropriate unit:

All laborers employed by the Respondent; but excluding all other employees, and all guards, professional employees and supervisors as defined in the Act.

(b) Make all contributions required pursuant to the collective-bargaining agreements including contractually required payments to the Health and Welfare Fund, the Pension Fund, the Training Fund, the Legal Services Fund, the Annuity Fund, and the New England Laborers and Employers Education Trust Fund.

(c) Make unit employees whole for any loss of benefits or other expenses suffered as a result of the Respondent's failure to make the contractually required payments.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amounts due under the terms of this Order.

(e) Post at its facility in Southington, Connecticut, copies of the attached notice marked "Appendix."<sup>2</sup> Copies of the notice, on forms provided by

<sup>2</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

#### APPENDIX

NOTICE TO EMPLOYEES  
POSTED BY ORDER OF THE  
NATIONAL LABOR RELATIONS BOARD  
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Connecticut Laborers' District Council of the Laborers' International Union of North America, AFL-CIO, as the limited exclusive representative of the employees in the following bargaining unit:

All laborers employed by the Respondent; but excluding all other employees, and all guards, professional employees and supervisors as defined in the Act.

WE WILL NOT fail or refuse to continue in full force and effect all the terms of our agreements by failing to make contractually required payments to the Health and Welfare Fund, the Pension Fund, the Training Fund, the Legal Services Fund, the Annuity Fund, and the New England Laborers and Employers Education Trust Fund.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL continue in full force and effect all the terms and conditions of our collective-bargaining agreements with the Union.

WE WILL make all contractually required contributions to the Health and Welfare Fund, the Pension Fund, the Training Fund, the Legal Services Fund, the Annuity Fund, and the New England Laborers and Employers Education Trust Fund.

WE WILL make our unit employees whole for any loss of benefits or other expenses suffered as a result of our failure to make contractually required contributions to the Health and Welfare Fund, the Pension Fund, the Training Fund, the Legal Services Fund, the Annuity Fund, and the New England Laborers and Employers Education Trust Fund.

DEVITO BROTHERS EXCAVATION,  
INC.